# Re Tunku Maryam bt Tunku Zainal Abidin; Ex-Parte Arab Malaysian Finance Berhad

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D1–29–2241 OF 2001
VINCENT NG KIM KHOAY J
3 APRIL 2006

*Bankruptcy — Creditors Petition — Challenging Bankruptcy notice and Creditors petition — What are the correct mode to be adopted*

*Civil Procedure — Forms and Procedure — Application to oppose creditors petition in bankruptcy proceedings — Whether fatal if the correct mode is not adopted — Order 1A of the Rules of the High Court 1980.*

*Bankruptcy — Creditors petition — Application to oppose — Whether the bankruptcy court can go behind the judgment obtained.*

The Judgment Creditor (JC) obtained summary judgment against the Judgment Debtor (JD) in the High Court before the Senior Assistant Registrar (SAR). The JD then filed an appeal against the SAR's decision to the judge in chambers, which was dismissed with costs. The JD further appealed to the Court of Appeal. Meanwhile, the JC issued a Bankruptcy Notice (BN) which was served on the JD requiring her to pay the sum due under the said judgment. On 12 November 2001, the JC filed a Creditor's Petition (CP) against the JD, which was served on her on 21 March 2002. On 11 July 2002, the JD filed a notice of intention to oppose the petition (encl 12) in Form 16, under r 117 of the Bankruptcy Rules 1969 (the Rules) based on the following grounds: (1) the outstanding amounts in her account was to be paid, settled and cleared by a third party by virtue of a Sale of a Share Agreement (the Settlement Agreement); (2) the JC assented to and therefore had full knowledge of the Settlement Agreement, and hence is estopped from making any claims against her let alone to enter any judgment against her; (3) the issue relating to the Settlement Agreement could only be disposed of through vide viva voce evidence and she had secured leave to appeal to the Court of Appeal against the judgment upon which the present Bankruptcy Petition was founded; (4) the purported debt had been compromised by virtue of the Settlement Agreement and the JC who is privy to the agreement now seeks to use the bankruptcy proceedings for collateral purpose to deprive her from having the issues ventilated before the Court of Appeal; and (5) it is a clear miscarriage of justice, if the JC is allowed to pursue the present petition for the debt is unenforceable in law. Prior to the filing of encl 12, the JD had also tried to set aside the BN by filing a summons in chambers (encl 6), which was dismissed by the SAR. An appeal to the judge in chambers against the dismissal of encl 6 was also dismissed. In another attempt to avoid being made a bankrupt, the JD filed a

summons in chambers (encl 18) to strike out the CP and alternatively, for a stay of the bankruptcy proceedings pending disposal of her appeal to the Court of Appeal. The SAR refused to strike out the CP but allowed a stay of the bankruptcy proceedings pending the disposal of the appeal to the Court of Appeal. On 14 January 2004, the Court of Appeal dismissed the JD's appeal. Thereafter, the SAR proceeded to hear encl 12 and the CP, dismissed encl 12 and accordingly made the Adjudicating Order and Receiving Order (AORO). Hence, this appeal by the JD. Among others the salient issues in this appeal were: (1) whether right mode was adopted in opposing creditors petition; and (2) Whether the Bankruptcy Court can go behind judgment obtained by JC.

**Held,** dismissing judgment debtor's appeal with costs:

(1) If a JD intends to apply to set aside the petition on other grounds e.g. for non-compliance with the rules regarding the petition, summons in chambers must be filed (see *Dato Sri Teong Teck Leng v Jupiter Securities Sdn Bhd (Dato Sri Teong Teck Leng)* [2004] 1 MLJ 1) (see para 8).

(2) If a proper application supported by affidavit is not filed to set aside a petition (e.g. due to non-compliance of the rules) there would not be sufficient material before the court for its determination (see para 8).

(3) By reading r 95 of the rules with its pertaining to form No 7, in conjunction with rule 117 of the rules and form No 16, it is clear separate and distinct forms are to be used in the two stages in a Bankruptcy proceeding in order to challenge a Bankruptcy Notice (BN) and a Creditor's Petition. Thus, Form 7 ought to be used to challenge a Bankruptcy Notice whereas Form 16 for showing cause 'to oppose the making of a receiving order as prayed' i.e. to oppose the Creditor's Petition (see para 10).

(4) The challenge, in both *Datuk Lim Kheng Kim v Malayan Banking Bhd (Datuk Lim Kheng Kim)* [1993] 2 MLJ 298 and *Development & Commercial Bank v Datuk Ong Kian Seng (D & C Bank)* [1995] 2 MLJ 724, was against the CP and not the BN, the Supreme Court and the Federal Court ought to, but seem not to have observed that the issue of counter-claim, set off or cross demand is mentioned in Form 7 under r 95 of the rules for setting aside a BN, Form 16 under r 117 of the rules makes no such mention. The court do not see why Form 16 could not also be used for grounds other than that the JD has a counter-claim, set off or cross demand, considering that this form has been specially formatted for the setting aside of a CP (see para 12).

(5) Even though in encl 12 the challenge was not that the JD has a counter-claim or set off or cross demand, considering that the same was filed on 11th July 2002 and Order 1A of The Rules of the High Court 1980 came into effect on 16th May 2002 the court held that encl 12 (the notice) in Form 16 was the proper form used by the JD to show cause against the petition and was thus wrongly dismissed by the SAR (see para 15).

(6) Unless the JD has shown a contumelious conduct through recurring disregard for rules, procedure or form (which runs foul of the principle that forms and procedure are enacted to be followed), courts should not have any fixation on

forms and procedure so that the true merits of the JD's complaint could be heard and a final decision reached provided that there is enough material tendered to the court for its determination (see para 15).

(7) It is trite law that a bankruptcy court cannot go behind the judgment save and except where the judgment is obtained by fraud, collusion or there was miscarriage of justice. In the present case, the JD has failed to show that the relevant judgment was obtained by fraud or collusion, and neither has the JD condescended upon any particulars of any miscarriage of justice or fraud or collusion committed by the JC (see para 18).

**[Bahasa Malaysia summary**

Pemiutang Penghakiman telah mendapatkan penghakiman terus terhadap Penghutang Penghakiman di Mahkamah Tinggi di hadapan Penolong Kanan Pendaftar (PKP). Penghutang Penghakiman kemudiannya memfailkan rayuan terhadap keputusan PKP kepada Hakim Dalam Kamar yang telah ditolak dengan kos. Penghutang Penghakiman kemudiannya merayu kepada Mahkamah Rayuan. Sementara itu, Pemiutang Penghakiman telah mengeluarkan Notis Kebankrapan (NK) yang telah diserahkan kepada Penghutang Penghakiman yang memerlukannya membayar jumlah tertunggak di bawah penghakiman tersebut. Pada 12hb November 2001, Pemiutang Penghakiman memfailkan Petisyen Pemiutang terhadap Penghutang Penghakiman, yang telah diserahkan kepadanya pada 21hb Mac 2002. Pada 11hb Julai 2002, Penghutang Penghakiman telah memfailkan Notis Niat Untuk Menentang Petisyen (lamp 12) dalam Borang 16, di bawah Kaedah 117 Kaedah-kaedah Kebankrapan 1969 (kaedah tersebut), berdasarkan kepada alasan-alasan berikut: (1) jumlah-jumlah tertunggak dalam akaunnya telah dibayar, diselesaikan dan dijelaskan oleh pihak ketiga mengikut Perjanjian Penjualan Saham (Perjanjian Penyelesaian); (2) Pemiutang Penghakiman telah bersetuju dan oleh itu mempunyai pengetahuan penuh kepada Perjanjian Penyelesaian, dan oleh itu diestop daripada membuat sebarang tuntutan terhadapnya dan tidak memasukkan sebarang penghakiman terhadapnya; (3) isu berkenaan dengan Perjanjian Penyelesaian hanya boleh dilupuskan melalui keterangan vide viva voce dan beliau telah mendapatkan kebenaran untuk merayu kepada Mahkamah Rayuan terhadap penghakiman di mana Petisyen Kebankrapan sekarang diasaskan; (4) hutang yang dikatakan telah timbul mengikut Perjanjian Penyelesaian dan PP yang merupakan privy kepada perjanjian sekarang menggunakan prosiding kebankrapan untuk tujuan sampingan bagi menghalangnya membawa isu-isu yang sudah mendapat perhatian umum ke Mahkamah Rayuan; dan (5) Ia adalah salah laksana keadilan yang jelas, jika Pemiutang Penghakiman dibenarkan untuk meneruskan petisyen sekarang untuk suatu hutang yang tidak boleh dilaksanakan dari segi perundangan. Sebelum memfailkan lamp 12, Penghutang Penghakiman juga cuba untuk mengenepikan NK dengan memfailkan Saman Dalam Kamar (lam 6), yang telah ditolak oleh PKP. Rayuan kepada Hakim Dalam Kamar terhadap penolakkan lamp 6 juga telah ditolak. Dalam percubaan lain bagi mengelakkan daripada menjadi bankrap, Penghutang Penghakiman telah memfailkan Saman Dalam Kamar (lamp 18) untuk membatalkan Petisyen Pemiutang dan juga secara alternatifnya, bagi menggantung prosiding kebankrapan sementara menunggu penyelesaian rayuannya di Mahkamah Rayuan. PKP enggan untuk membatalkan Petisyen Pemiutang tetapi

membenarkan penggantungan prosiding kebankrapan sementara menunggu Mahkamah Rayuan. Pada 14hb Januari 2004, Mahkamah Rayuan menolak rayuan Penghutang Penghakiman. Selanjutnya, PKP meneruskan untuk mendengar Lamp 12 dan Petisyen Pemiutang, menolak lamp 12 dan seterusnya membuat Perintah Penghukuman dan Perintah Penerimaan (PPPP). Oleh kerana itu, Penghutang Penghakiman memfailkan rayuan. Antaranya isu-isu menonjol dalam rayuan ini adalah: (1) sama ada cara yang betul telah digunakan dalam menentang petisyen pemiutang; dan (2) sama ada Mahkamah Kebankrapan boleh melangkaui penghakiman yang telah diperolehi oleh Pemiutang Penghakiman.

**Diputuskan,** menolak rayuan penghutang penghakiman dengan kos:

(1) Jika Penghutang Penghakiman berniat untuk mengenepikan petisyen atas alasan seperti ketidakpatuhan kaedah-kaedah berkenaan petisyen-petisyen, saman dalam kamar mestilah difailkan (lihat: *Dato Sri Teong Teck Leng v Jupiter Securities Sdn Bhd (Dato Sri Teong Teck Leng)* [2004] 1 MLJ 1) (lihat perenggan 8).

(2) Jika permohonan sempurna yang disokong oleh afidavit tidak difailkan untuk mengenepikan sesuatu petisyen (seperti ketidakpatuhan kepada kaedah-kaedah) ia tidak menjadi bahan yang mencukupi untuk mahkamah menentukannya (lihat perenggan 8).

(3) Dengan membaca kaedah 95 kaedah tersebut berkenaan dengan borang No. 7, berhubungan dengan kaedah 117 kaedah tersebut dan borang No. 16, ia adalah jelas borang yang berbeza dan berlainan hendaklah digunakan dalam kedua-dua peringkat prosiding kebankrapan untuk tujuan menentang notis kebankrapan (NK) dan petisyen pemiutang. Oleh itu, Borang 7 hendaklah digunakan untuk mencabar notis kebankrapan manakala Borang 16 untuk menunjuk sebab 'bagi menentang perintah penerimaan sebagaimana yang dipohon' iaitu bagi menentang petisyen pemiutang (lihat perenggan 10).

(4) Cabaran dalam kedua-dua kes *Datuk Lim Kheng Kim v Malayan Banking Bhd (Datuk Lim Kheng Kim)* [1993] 2 MLJ 298 dan *Development & Commercial Bank v Datuk Ong Kian Seng (D & C Bank)* [1995] 2 MLJ 724, adalah terhadap Petisyen Pemiutang dan bukannya NK, Mahkamah Agong dan Mahkamah Persekutuan seharusnya, tetapi tidak seperti yang berlaku, telah memberikan perhatian bahawa isu tuntutan balas, tolakan atau tuntutan selisih ada disebutkan dalam Borang 7 di bawah kaedah 95 kaedah tersebut untuk mengenepikan sesuatu NK, Borang 16 di bawah kaedah 117 kaedah tersebut tidak membuat sebarang sebutan mengenainya. Mahkamah tidak dapat melihat kenapa Borang 16 juga tidak boleh digunakan untuk alasan selain daripada Penghutang Penghakiman mempunyai tuntutan balas, tolakan dan tuntutan selisih, mengambilkira bahawa borang ini telah diformatkan secara khusus bagi mengenepikan Petisyen Pemiutang (lihat perenggan 12).

(5) Walaupun dalam lamp 12 cabaran adalah bukan Penghutang Penghakiman mempunyai tuntutan balas atau tolakan atau tuntutan selisih, mengambilkira perkara sama telah difailkan pada 11hb Julai 2002 dan Kaedah 1A Kaedah-Kedah Mahkamah Tinggi 1980 berkuatkuasa pada 16hb Mei 2002

Mahkamah berpendapat bahawa Lamp 12 (notis tersebut) dalam Borang 16 adalah borang yang sesuai digunakan oleh Penghutang Penghakiman untuk menunjuk sebab terhadap petisyen dan oleh itu telah secara salah ditolak oleh PKP (lihat perenggan 15).

(6) Melainkan Penghutang Penghakiman telah menunjukkan perlakuan yang menghina dengan mengulangi pengabaian kepada aturan-aturan, tatacara dan borang (yang telah lari daripada prinsip bahawa borang-borang dan tatacara dibuat untuk dipatuhi) mahkamah-mahkamah tidak seharusnya mempunyai hubungan emosi yang tidak sihat ke atas borang-borang dan tatacara- jadi baik buruk aduan Penghutang Penghakiman akan dapat didengar dan keputusan akhir akan dicapai- dengan syarat terdapat bahan mencukupi yang telah dikemukakan kepada mahkamah untuk penentuannya (lihat perenggan 15).

(7) Adalah undang-undang biasa bahawa mahkamah kebankrapan tidak boleh melangkaui penghakiman melainkan penghakiman diperolehi melalui penipuan, pakatan sulit atau terdapat salah laksaan keadilan. Dalam kes ini, penghutang penghakiman telah gagal menunjukkan bahawa penghakiman relevan telah diperolehi melalui penipuan dan pakatan sulit, dan tidak juga Penghutang Penghakiman menunjukkan sebarang butiran-butiran salah laksana keadilan atau penipuan atau pakatan sulit yang telah dilakukan oleh Pemiutang Penghakiman (lihat perenggan 18).]

**Notes**

For cases on creditor's petition on bankruptcy, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2368–2400.

For the case on creditor's petition on civil procedure, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2012.

**Cases referred to**

*Arab Malaysian Finance Bhd lwn Tunku Maryam Tunku Zainal Abidin* [2000] 3 CLJ 264 (refd)

*Datuk Lim Kheng Kim v Malayan Banking Bhd (Datuk Lim Kheng Kim)* [1993] 2 MLJ 298 (refd)

*Development & Commercial Bank v Datuk Ong Kian Seng (D & C Bank) (1995) 2 MLJ 724* (refd)

*Re Sebastian, ex parte Metroplex Leasing & Credit Corp Sdn Bhd (Re Sebastian)* [1990] 3 MLJ 248 (refd)

*Sovereign General Insurance Sdn Bhd v Koh Tian Bee (Sovereign General)* [1988] 1 MLJ 304 (refd)

*Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 203 (refd)

**Legislation referred to**

Bankruptcy Rules 1969 rr 18, 95,117, 274
Bankruptcy Act 1967 ss 3(1)(i),6(2)
Rules of the High Court 1980 O 1A

*Saranjit Singh (Vasdev Bakshani and Associates) for the judgment debtor.*
*David K H Lee (S K Yeoh & Partners) for the judgment creditor.*

**Vincent Ng Kim Khoay J:**

BACKGROUND FACTS

**[1]** The judgment creditor (JC) applied and on 1 June 1995 obtained summary judgment against the judgment debtor (JD) in the High Court at Kuala Lumpur vide suit No: D1-22-325-1989 before the Senior Assistant Registrar (SAR). The JD then filed an appeal against the SAR's decision to the judge in chambers which was dismissed with costs. The learned judge's grounds of judgment dated 16 February 2000 has since been reported in the Law journal (see *Arab Malaysian Finance Bhd v Tunku Maryam Tunku Zainal Abidin* [2000] 3 CLJ 264). Dissatisfied with the learned judge's decision, the JD further appealed to the Court of Appeal. Meanwhile, on 24 April 2001 the JC issued a Bankruptcy Notice (BN) which was served on the JD on 16 July 2001, requiring her to pay the sum of RM 248,632.21 owing as at 24 April 2001, being the amount due under the said judgment. On 12 November 2001, the JC filed a creditor's petition (CP) against the JD which served on her on 21 March 2002. Over three and a half months thereafter, on 11 July 2002, the JD filed a notice of intention to oppose petition (encl 12) in Form 16, under r 117 of the Bankruptcy Rules 1969 (the Rules) based on the following grounds:

(i) the outstanding amounts in her account was to be paid, settled and cleared by a third party by virtue of a Sale of Share Agreement (the Settlement Agreement);

(ii) the JC assented to and therefore had full knowledge of the Settlement Agreement, and hence is estopped from making any claims against her let alone to enter any judgment against her;

(iii) the issue relating to the Settlement Agreement could only be disposed of through vide viva voce evidence and she had secured leave to appeal to the Court of Appeal against the judgment upon which the present Bankruptcy Petition was founded (see para 21 of JD's affidavit affirmed on 22 Jan 2003 (encl 17)) - leave was required because the judgment sum was below the statutory limit for appeal;

(iv) the purported debt had been compromised by virtue of the Settlement Agreement and the JC who is privy to the agreement now seeks to use the bankruptcy proceedings for collateral purpose to deprive her from having the issues ventilated before the Court of Appeal; and

(v) it is a clear miscarriage of justice, if the JC is allowed to pursue the present petition for the debt is unenforceable in law.

**[2]** Notably, prior to the filing of encl 12, the JD had also tried to set aside the BN by filing a summons in chambers (encl 6) which was dismissed by the SAR on 18 December 2002. An appeal to the judge in Chambers against the dismissal of encl 6 was also dismissed by me on 8 May 2003. In another attempt to avoid being made a bankrupt, the JD filed a summons in chambers (encl 18) to strike out the CP and alternatively, for a stay of the bankruptcy proceedings pending disposal of her appeal to the Court of Appeal. After hearing arguments on encl 18 the learned SAR

refused to strike out the CP but allowed a stay of the bankruptcy proceedings pending the disposal of the appeal to the Court of Appeal. On 14 January 2004, the Court of Appeal dismissed the JD's appeal. There was no further appeal by the JD to the Federal Court. Thereafter, on 22nd February 2005, the SAR proceeded to hear encl 12 and the CP, dismissed encl 12 and accordingly made the Adjudicating Order and Receiving Order (AORO). Hence, this appeal before me.

SHOW CAUSE PROCEDURE AGAINST A CREDITOR'S PETITION (CP)

**[3]** The counsel for the JC submitted that the procedure adopted by the JD to show cause against the CP was improper as no summons in chambers was filed. The JC grounded its objection upon the ratio of the then Supreme Court in *Datuk Lim Kheng Kim v Malayan Banking Bhd (Datuk Lim Kheng Kim)* [1993] 2 MLJ 298 which was followed and affirmed by the Federal Court in *Development & Commercial Bank v Datuk Ong Kian Seng (D & C Bank)* [1995] 2 MLJ 724. The pertinent dicta of Mohamed Dzaiddin SCJ (as he then was) in delivering the grounds of decision of the then apex court in *Datuk Lim Kheng Kim* (at pp 305-305 of the report) bears quotation:

> Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The format of the notice of intention to oppose the petition is set out in Form 16 of the Rules, which simply provides that:
>
> the above … do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, or as the case may be)
>
> Looking at the appellant's 'affidavit in opposition', it appears that he had jumbled up every conceivable grounds of opposition he could think of in this affidavit, which not only includes grounds raised in encl 3, but also submissions of law and pleas for the court to exercise its discretion judicially and in the interest of justice. Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counter-claim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r 18, which reads:
>
> Applications to be made by motion. Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.
>
> In our opinion, failure on the part of the appellant to follow r 18 renders his 'affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.

**[4]** From the contents of encl 12 which I have reproduced earlier in this judgment, it is clear that the JD has not challenged the CP on the ground that she has a counter-claim, set off or cross demand which equals or exceeds the judgment debts. In essence, her challenge (in encl 12) on the principle of estoppel was grounded upon

her contention that there was an accord and satisfaction of all her debts by a third party and that the JC had consented to the arrangement.

**[5]** Counsel for the JD submitted that to oppose a CP, JD needed only to file the notice in Form 16 of the Rules. The case of *Dato Sri Teong Teck Leng v Jupiter Securities Sdn Bhd (Dato Sri Teong Teck Leng)* [2004] 1 MLJ 1 was cited in support of this contention. Abdul Hamid Mohamed FCJ delivering judgment of the Court of Appeal inter alia held:

> Where the judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form 16, by virtue of r 117, specifying the statements in the petition which he intends to deny or dispute. However, where the debtor wants to apply to set aside the petition on other grounds, eg. for non-compliance with the rules regarding the petition, only then must a summons in chambers be filed. This is because such grounds arise separately from the statements in the petition and therefore cannot be specified in the notice.

**[6]** It was submitted that in *Dato Sri Teong Teck Leng*, the Court of Appeal clarified and distinguished the then Supreme Court's decision in *Datuk Lim Kheng Kim* and the High Court is bound by the later decision of the Court of Appeal.

**[7]** In *Dato Sri Teong Teck Leng,* Abdul Hamid Mohamed FCJ (sitting as a Court of Appeal Judge) is of the opinion that, if a judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form 16 under r 117, specifying the statements in the petition which he intends to deny or dispute, and such statements is not restricted to the existence of a counter-claim or set off or cross demand. Other grounds could be raised in the notice to show cause and there is no need to file a summons in chambers. Thus, this decision of the Court of Appeal is in conflict with the opinion expressed in *Datuk Lim Kheng Kim* which decided that a notice to show cause under r 117 of the rules is only applicable where the judgment debtor has a counter-claim or set off or cross demand as specified in s 3(1)(i) of the Bankruptcy Act 1967 (the Act). Thus, grounds other than counter-claim or set off or cross demand could not be raised in such notice under Form 16, and if there are other grounds, the judgment debtor should make a formal application by a motion (it could now be made by a summons in chambers) supported by an affidavit under r 18 of the Rules. In *Datuk Lim Kheng Kim* the judgment creditor had filed a creditor's petition and several affidavits were filed by the judgment debtor to oppose the CP. The Supreme Court held that the affidavits were filed not in accordance with the prescribed procedure to oppose the CP.

**[8]** After a careful study of *Datuk Lim Kheng Kim, Ong Kian Seng and Dato Sri Teong Teck Leng,* I find myself largely in favour of the aforesaid views expressed by Abdul Hamid Mohamed (FCJ – sitting as a Court of Appeal judge in *Dato Sri Teong Teck Leng*) that only if a JD intends to apply to set aside the petition on other grounds e.g. for non-compliance with the rules regarding the petition, must summons in chambers be filed. My reason being that his Lordship's decision was delivered a good few years after the amendment O 1A (infra) became law. I would add that, in my opinion, if a proper application supported by affidavit is not filed to set aside a

petition (e.g. due to non-compliance of the rules) there would not be sufficient material before the court for its determination.

**[9]** I am of the opinion that the following issues could have been discussed in *Dato Sri Teong Teck Leng*. I shall now endeavour to do so.

**[10]** It is illuminating to set out herein and examine the relevant r 95 with its pertaining form No 7, in conjunction with r 117 where form No 16 would have to be used. A motion under r 18 was recommended for use in the judgment in *Dato Lim Kheng Kim* the form to be employed now is a summons in chambers.

*95 Application to set aside*

1 The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

2 If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

*117 Debtor intending to show cause*

Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

No 7

(Rule 95)

(Title)

AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY NOTICE

I …… of ……affirm and say:

1 That I was, on the …… day of ……., served with the notice hereunto annexed (or describe the notice).

That I have satisfied the judgment debt claimed by ……. By (state nature of satisfaction).

2 That I have a counter-claim (or set-off or cross demand) for $ …… being a sum equal to (or exceeding) the claim of the said …….. in respect of (here state grounds of counter-claim).

3 That I could not have set up the said counter-claim (or as the case may be) in the section in which the said judgment was obtained against me. Affirmend at, etc …….

---

*No 16*

(Rule 117)

(Title)

NOTICE BY DEBTOR OR INTENTION TO OPPOSE PETITION

In the matter of a bankruptcy petition presented against me ……. of …… on the ……. day of ……., 19 ……. by ……. of ……. (or and ……. of ……., etc).

I, the above ……., do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, or as the case may be).

Dated this ……. day of ……. 19 ……

…….

Signature

To ……, of ……., and to …… and to the Registrar of the said Court.

---

**[11]** Clearly, from the above specific provisions, separate and distinct forms are to be used in the two stages in a Bankruptcy proceedings in order to challenge a Bankruptcy Notice (BN) and a Creditor's Petition. Thus, Form 7 ought to be used to challenge a Bankruptcy Notice whereas Form 16 for showing cause 'to oppose the making of a receiving order as prayed' i.e. to oppose the Creditor's Petition. Obviously, a judgment debtor is expected to know at the early BN stage of the bankruptcy proceedings, rather than at the later CP stage, whether or not he or she has a counter claim, set off or cross-demand against the JC. It is most important and indeed pertinent to note that the contention that a JD has a counter-claim or set-off or cross demand arises only when a challenge is made against the BN by the JD in Form 7 under r 95.

**[12]** It is my respectful view that as the challenge, in both *Datuk Lim Kheng Kim* and *Ong Kian Seng*, was against the CP and not the BN, the Supreme Court and the Federal Court ought to, but seem not to have observed that whereas the issue of counter-claim, set off or cross demand is mentioned in Form 7 under r 95 for setting aside a BN, Form 16 under r 117 makes no such mention. This may have led over apex courts to conclude that a motion (now summons in chambers) under r 18 should have been filed to set aside the CP. I do not see why Form 16 could not also be used for grounds other than that the JD has a counter-claim set off or cross demand, considering that this form has been specially formatted for the setting aside of a CP.

**[13]** Be that as it may, it is important to note that both *Datuk Lim Kheng Kim* and *Ong Kian Seng* were decisions made many years before Amendment O 1A Rules of the High Court 1980 was enacted (it came into effect on 16th May 2002). This was a special amendment which enjoins the court or a judge to (shall) 'have regard to the justice of the particular case and not only to the technical non-compliance of the rules therein'.

**[14]** No doubt, pertaining to non-compliance of rules and forms, even the Bankruptcy Rules, particularly r 274 states as follows:

> *274 Effect of non-compliance with Rules*
>
> Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

**[15]** However, due to its proviso 'unless the Court shall so direct but such proceeding may be set aside', r 274 is, unlike O 1A, an equivocal provision of feeble effect. Thus, notwithstanding the ratio of our apex courts in *Lim Kheng Kim* and *Ong Kian Seng,* we ought to take heed and observe O 1A, which in my view, has overriden the effect and application of the ratio decidendi in both the cases. Thus, even though in encl 12 the challenge was not that the JD has a counter-claim or set off or cross demand, considering that the same was filed on 11th July 2002 and O 1A came into effect on 16th May 2002, I hold that encl 12 (the notice) in Form 16 was the proper form used by the JD to show cause against the petition and was thus wrongly dismissed by the SAR. In my view, unless the JD has shown a contumelious conduct through recurring disregard for rules, procedure or form (which runs foul of the principle that forms and procedure are enacted to be followed) courts should not have any fixation on forms and procedure so that the true merits of the JD's complaint could be heard and a final decision reached provided that there is enough material tendered to the court for its determination. I shall now consider the merits of the JD's appeal.

THE MERITS

**[16]** The JD says that she ought to be given an opportunity to ventilate the issues in encl 12, which was raised before the Court of Appeal. These same issues were in fact ventilated before, but failed to find favour in the Court of Appeal, which dismissed same. Hence, with the dismissal of the JD's appeal the hearing of encl 12 and CP resumed before the SAR. Again, the same issues were re-ventilated. I am minded to hold that the JD is not at liberty and is precluded from re-litigating the same issues since they were fully considered and determined by the Court of Appeal. Clearly, the JD has exhausted all avenues to challenge the final judgment entered against her. Hence, the principle of estoppel and res judicata is fully applicable against the JD. Regretably, the JD has, through encl 12, attempted so to re-litigate, which has incurred the loss of precious judicial time and is an abuse of the legal process.

**[17]** Undeterred by the JC's contention that she could not re-litigate the same issue, the JD has now asserted that this court could and should go behind the judgment. The JD contends that under s 6(2) of the Act, the bankruptcy court must require proof of the creditor's debt. And that the existence of a judgment debt does not ipso facto warrant the granting of the Adjudication Order and a Receiving Order being granted, if there was 'other sufficient cause' for the petition to be dismissed. It is further submitted that where a r 117 notice is filed, the JC must render proof of indebtedness again. The High Court's decision in *Re Sebastian, ex parte Mertoplex*

*Leasing & Credit Corp Sdn Bhd (Re Sebastian)* [1990] 3 MLJ 248 amongst other, was cited in support of that contention. In *Re Sebastian* it was, inter alia, held:

> The court of bankruptcy has the power, at the instance of the debtor himself, to go behind the judgment and to enquire into the validity of the debt even though the debtor has previously applied in the action to set aside the judgment and his application has been refused and affirmed on appeal. In view of the provision of s 92(1) of the Bankruptcy Act 1967, there is no reason why that power to go behind or around the judgment may not be exercised in an application to review, rescind or vary the receiving and adjudicating orders that had been made. This exceptional jurisdiction will of course be exercised only in a proper case.

**[18]** It is trite law that a bankruptcy court cannot go behind the judgment. This law has been settled by the then Supreme Court's decision in *Sovereign General Insurance Sdn Bhd v Koh Tian Bee (Sovereign General)* [1988] 1 MLJ 304 where, at p 305 of the report, the then apex court had held:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment (see *In Re Easton* (1893) 10 Mor 111; 9 TLR 409). Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under s 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. Having regard to these provisions, it was wrong for the learned judge to strike out the creditors' petition

**[19]** The ratio *In Sovereign General* was that the bankruptcy court may go behind the judgment only in three instances, namely, where the judgment is obtained by:

i fraud;

ii collusion; or

iii there was miscarriage of justice.

**[20]** In the present case, the JD has failed to show that the relevant judgment was obtained by fraud or collusion, and neither has the JD condescended upon any particulars of any miscarriage of justice or fraud or collusion committed by the JC. In fact, none of the statements in encl 12 referred to fraud or collusion in relation to or which led to the entering of the judgment and not an iota of evidence was forthcoming from the JD in this regard. More importantly, it should be noted that at all material times she was represented throughout the proceedings, before the SAR, the learned judge as well as in the Court of Appeal by able and experienced counsel. As to the term miscarriage of justice', in *Re Howell* [1915] Vol 84, LJR KB at pp 1399-1400 the learned judge said:

> I have only been troubled in this case as to what is the meaning of the words 'miscarriage of justice' in FLATAU, In Re (22 Q.B.D. 83), I think that the working rule is that the Registrar can go behind the judgment where it is a judgment by default or compromise. He ought not to go behind it, when the judgment has been given in open Court against a person who is represented

**[21]** The summary judgment obtained against the JD was not a default judgment. Having been represented by counsel during the entire proceedings when the judgment was entered by SAR and affirmed by the learned judge, and on appeal, also by the Court of Appeal, surely, in these circumstances miscarriage of justice could be ruled out. The judgment is a final and conclusive judgment debt against the JD. Based on the above reasons the JD's appeal cannot be sustained. The appeal ought to be and is now dismissed with costs.

IN POSTLUDE

**[22]** In *Tan Ah Tong v Dato' Sri Dr Kuljit Singh* [2002] 6 MLJ 43, also a bankruptcy matter, I had occasioned to make the following comments:

> Considering the chequered track record of the parties herein, I am fairly certain that after a further umpteen years from now, God willing (in terms of the gift of tenacious genes) the eventual question of costs incurred in the whole saga would be fought out in similar tenacious style at all levels of the court ad infinitum and ad nauseum

**[23]** Similarly, the instant case is also destined to devolve into a saga of court battles perhaps at all levels, as the JD has appealed against this decision. It is interesting to note that, in respect of the summary judgment now sought by the JD to be impugned, the learned judge had written a comprehensive judgment (see [2002] 3 CLJ 264) which was indeed affirmed by the Court of Appeal. It is my opinion that the common saga of long court battles in bankruptcy cases stems from the interplay of certain Asian cultural traits where the unjust stigma attached to bankrupts is particularly pronounced. This often motivates a JC to proceed against a JD under the bankruptcy law rather than bother to trace his or her property for execution. This phenomenon is compounded by the fact that many JDs would rather pay their lawyers than a JC armed with a valid and final judgment. With the proliferation of credit-card issuance and debts and easy availability of car loans and defaults, I would anticipate an increasing and substantial workload of bankruptcy cases in the near future, especially in the commercial courts and the Court of Appeal. The courts would be overwhelmed with a deluge of such work. In Malaysia, this observation could also apply to winding-up cases in court, due to the tendency of lawyers to adopt the short-cut statutory (rather than the common law) method of debt recovery, at times, even for recovery of their professional fees. In his tour of duty, having served a substantial period in the Commercial Division, I think we should take heed of the words of Hamid Mohamed JCA (as he then was), when, in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 203 (a winding-up matter), he observed that:

> As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably

stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal, or may even try to go further, further delaying the hearing of the petition. I have come across cases when even an order made by the senior assistant registrar under r 32 of the Companies (Winding-up) Rules 1972 ('the Rules') was appealed against, and when the appeal was dismissed, the respondent further appeal to the Supreme Court (see *Asia Commercial Finance (M) Bhd v Lum Choon Realty Sdn Bhd Penang*) High Court Winding Up No 28-60-92. Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

**[24]** Regretably, even in Bankruptcy cases, I have observed the common ploy of JDs to grossly delay court proceedings, by making all sorts of applications for striking out etc at the BN stage, as well later, at the CP stage of the proceedings and then to appeal to the judge in chambers, the Court of Appeal and even to the Federal Courts coupled with an application for stay of the petition. In the result, it sometimes takes a JC eight to fifteen years to recover the judgment debt or to secure a truly final adjudication and receiving order. Just take this case as an example. The JC first obtained judgment on 1st June 1995 before the SAR, which was confirmed by the judge in chambers and the Court of Appeal without further appeal by the JD. Until now, about 11 years later, the JC has yet to recover the fruits of litigation and the JD is still trying to 'go behind the judgment'. When it dawned on her counsel that she was about to fail on this score her counsel adopted the 'other sufficient cause' argument to support her contention that 'the existence of a valid judgment does not ipso facto warrant an Adjudication and Receiving Order.' And, now that she has appealed against my decision confirming the AORO, a few years may yet have to be added to the eleven years delay that the JC has had to endure to recover the judgment debt.

**[25]** In order to address this deluge of Bankruptcy cases, judges in my Division have been inspired to implement the spirit of the amendment to s 3 of the Court of Judicature Act 1964 (concerning finality of the decision in the subject matter of the proceeding) and have remitted 11 appeals against the SAR's decision on e.g. striking out of the BN or CP, back to the SAR for the CP to be heard without prejudice to the right of either party to raise any issues concerning the integrity of the BN or CP, when the appeal is heard before the judge in chambers against the AORO being allowed or disallowed.

*Judgment debtor's appeal dismissed with costs.*

Reported by K Krishnan